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Inclusive Business Initiative Conference  
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**The National Model Disparity Study  
Project:  
Designing a Legally Defensible  
Disparity Study & Request for Proposals**

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# TRB Model Disparity Study Background

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- Regulations state a disparity study *may* be used to set goals but is not *required* to set goals
- *Western States* suggests a study is necessary in the 9th circuit
- Other circuits are relying on studies to determine if programs are narrowly tailored
- There were no existing study guidelines
- Agencies need to be proactive
- TRB expanded the project to add airports
- CHA & NERA Economic Consulting selected

# TRB Model Disparity Study Objectives

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- Provide guidelines to state DOTs and airports to determine when studies are needed
- Develop a model scope of work to include in RFPs
- Develop a model disparity/availability study design
- Determine what data should be collected

# TRB Model Disparity Study Tasks

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- Analyze DBE regulations & case law
  - Identify common themes & key distinguishing factors that influenced courts
  - Comment on when studies should be conducted
- Identify elements of successful studies
- Review all studies to identify models
  - Discuss successful & rejected studies
  - Identify types & qualities of data agencies should maintain
  - Identify ways to conduct updates

# TRB Model Disparity Study Tasks, cont.

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- Review & analyze current statistical methods
  - Define availability of DBEs
  - Measure the current effects of past & present discrimination
  - Describe standards to ensure study results are statistically valid
- Analyze costs
  - Identify factors influencing costs
  - Describe the information needed to estimate & manage costs
  - Describe ways to collaborate with other agencies

# TRB Model Disparity Study Implementation Plan

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- Suggest practical activities to promote application of models
- Describe the audience for models
- Describe possible impediments to success
- Suggest possible institutional and individual leaders in applying the research product
- Develop criteria to judge the progress & consequences of model implementation

## Legal Framework: *Western States v. WSDOT*

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- Washington State DOT's USDOT-approved Program was insufficiently narrowly tailored because WSDOT presented
  - No evidence of discrimination in its local marketplace
  - No evidence that each minority group had suffered discrimination in local marketplace
  - Insufficient statistical analysis

## Legal Framework: *Western States v. WSDOT*, cont.

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- Appeals court made several analytical mistakes
  - No regulatory requirement for a Step 2 adjustment to availability “but for” discrimination
  - It is improper to control for variables infected by discrimination (revenues, bonding capacity, etc.)
  - Disparity between DBE availability of 11.17% & 9% utilization on contracts without goals is large not “small”



## Legal Framework: *Western States v. WSDOT*, cont.

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- Implications

- While Part 26 doesn't require disparity studies, the court suggests that evidence that would comprise such studies is necessary for narrow tailoring
- Detailed geographic & product market analyses are required
- Analysis must be disaggregated for each racial & ethnic group and white women
  - Waivers for disaggregated goals should be sought
  - Some groups may be excluded from goal credit based on study results

## Legal Framework: *Northern Contracting v. IDOT*

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- Trial & appellate courts upheld Illinois DOT's DBE Program
- IDOT had ample evidence of discrimination against DBEs in its contracting marketplace
- IDOT's Plan was narrowly tailored
- Court sustained 22.77% DBE goal

## Legal Framework: *Northern Contracting v. IDOT*, cont.

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- IDOT's Availability Study
  - Custom census used for step 1
    - Statistical analysis of agency's geographic & products marketplaces built on Dun & Bradstreet data
  - Step 2 based upon Census data
    - Statistical analysis of disparities in DBEs' business formation rates & business earnings vs. similar non-DBEs
    - "But for" discrimination, DBE availability would be 27.51%
    - IDOT didn't adjust the Step 1 figure, to comply with 7th Circuit case law to set a "plausible lower bound estimate"

## Legal Framework: *Northern Contracting v. IDOT*, cont.

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- Additional trial evidence
  - Expert testimony about proper DBE Program design
  - IDOT's public hearings
  - Judicial decision finding discrimination in Chicago's construction industry
  - “Unremediated markets” data
  - Lay witness testimony

# *Northern Contracting v. IDOT*

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- Implications

- While Part 26 doesn't require disparity studies, the successful trial evidence included proof that would be part of a study
  - Detailed, weighted custom census
  - Private sector disparity testing
  - Unremediated markets data
  - Anecdotal testimony

# Project Scope

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- Reviewed
  - 50 state DOT goals
  - 40 airport goals
  - 142 disparity or availability studies
    - 27 state DOT studies
    - 19 airport studies
  - 55 RFPs
  - Relevant court decisions
  - Law reviews & other scholarly articles on DBE litigation and disparate impact statistical analysis

# Disparity Study Objectives

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- Provide litigation defense
  - Studies aren't challenged; programs are challenged
- Meet regulatory requirements
  - Overall, annual DBE goal setting
  - Contract goals development
- Administrative improvements
  - Obtain confidential customer feedback
  - Create focus on data collection

# Disparity Study Elements

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- Determine utilization
  - Level of detail (4 digit NAICS vs. “construction”)
  - Level of contracts
    - Ceilings (e.g., \$500K)
    - Floors (e.g., informal threshold)
  - Missing non-DBE subcontractor data?
    - Survey primes?
    - Sample?
  - Race-neutral vs. race-conscious participation



## Disparity Study Elements, cont.

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- Determine geographic & product marketplaces
  - Threshold for utilization
    - 75% of contracts?
  - Weighted?
- Determine availability/Step 1 headcount
  - Sec. 26.45(c) list or custom census
  - What to use for contract goal setting?

# Disparity Study Elements, cont.

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- “Disparity” versus “availability” study
  - Availability is a subset of disparity (step 1)
    - Step 1 headcount
  - Disparity elements (step 2)
    - What would availability be in a discrimination free world?
      - Qualitative determination
      - Quantitative measurement
    - Statistical & anecdotal evidence of discrimination
    - Program implementation review
      - Effect of the DBE program  $\neq$  downward adjustment

## Disparity Study Elements, cont.

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- Study scope
  - Years of contract data
  - Types of contracts
    - USDOT-funded
    - Local-funded?
    - Informal?
  - Program review
    - Evaluate the effectiveness of race-neutral measures
    - Utilization on no-goals contracts

## Disparity Study Elements, cont.

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- Agency contracts disparity analysis
  - Necessary but not sufficient for DBE programs because of the effect of remedial market intervention
  - Effect of finding of no disparity
- Quantitative large scale survey evidence
  - DBEs' vs. non-DBEs' business experiences on public & non-goals jobs
  - Non-response testing?

# Disparity Study Elements, cont.

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- Economy-wide disparity analysis
  - Look outside agency's own contracting activities
  - DBEs' vs. non-DBEs' business formation rates & earnings from Census data sources
  - Credit market discrimination analysis
    - Based on Federal Reserve & SBA surveys
    - Narrowly tailor with custom local surveys
  - Critical element of legal defense for DBE programs

## Disparity Study Elements, cont.

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- “Capacity” analysis
  - Compare contract size/number of award to DBE primes vs. non-DBE primes
  - Compare individual DBE revenues to non-DBE revenues
  - Data sources
    - Agency awards
    - Prime contractor surveys
  - Regression analysis possible?
  - Impact of discrimination

## Disparity Study Elements, cont.

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- Anecdotal evidence
  - Necessary but not sufficient
  - Explore current effects of past biases & exclusion
  - Examine denials of full & fair access to government contracts & subcontracts
  - Evaluate existing programs for effectiveness in remedying discrimination & providing opportunities

## Disparity Study Elements, cont.

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- Types of anecdotal evidence
  - Business experience surveys
  - Focus groups
  - Public hearings
  - Older studies
  - Judicial decisions
  - Discrimination complaints



# RFP Design Elements

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- Scope of work
  - Keep it simple & general
  - Ask consultants to tell you how to do it; don't mandate a methodology other than demonstrated legal defensibility
  - Don't separate into "phases"
  - Clearly & in detail describe the state of the agency's prime & subcontract data

## RFP Design Elements, cont.

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- Time for completion
  - Usually at least one year
  - Missing subcontractor information will affect the timeline
- Cost factors
  - Number of years of data
  - Size of marketplace
  - Reconstruction of missing subcontractor records

## RFP Design Elements, cont.

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- Role of legal counsel
- Procurement method
  - RFP
  - RFQ or LOI
- Method of dissemination
  - Web posting
  - Notification to registered vendors
  - Notification to disparity consulting community
- Mandatory pre-proposal conference?

## RFP Design Elements, cont.

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- Time to respond
- Conduct interviews
  - Clarify proposal
  - Evaluate potential expert witnesses
- Review standard contract terms to avoid FOIA fishing expeditions & data misuse
- Designate a project manager with:
  - Broad agency knowledge & experience
  - Sufficient “clout” to move the process

# Final Thoughts

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- Don't panic in the 9th Circuit
  - WSDOT is setting race-conscious goals higher than before the litigation
  - Added anecdotal evidence to the availability study
- Litigation shift to transit agencies & airports?
- Study method determines the outcome
- Don't lose sight of the DBE Program's remedial purpose

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